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Case No. 06-1368

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD LEE HARVEY, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER CERTIORARI REVIEW IS WARRANTED TO REVIEW A STATE COURT'S RULING WHICH IS MERELY AN APPLICATION OF LONG STANDING PRECEDENT FROM THIS COURT

II. WHETHER CERTIORARI REVIEW IS WARRANTED TO REVIEW A STATE COURT'S RULING WHICH IS MERELY AN APPLICATION OF LONG STANDING PRECEDENT FROM THIS COURT

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STATUTES

28 U.S.C. §1257 1

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD LEE HARVEY, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

OPINIONS BELOW

The opinion below has been reported as Harvey v. State, 946 So.2d 937 (Fla. 2004), and Harvey v. State, 656 So.2d 1253 (Fla. 1995).

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1257. Although this is the appropriate provision, the requirements of same have not been met.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

Respondent rejects petitioner's statement of the facts as they are incomplete and argumentative. Respondent relies on the facts as recounted below from the direct appeal, the facts recounted in the two postconviction appeals from the Florida Supreme Court, and those facts that appear in the argument section of this response.

The Florida Supreme Court recounted the evidence as follows:

> On February 23, 1985, Harold Lee Harvey met with Scott Stiteler, his codefendant at trial, and drove to the home of William and Ruby Boyd, intending to rob them. Upon their arrival, Stiteler knocked on the front door. In the meantime, Harvey grabbed Mrs. Boyd as she was walking around from the side of the house and took her into the house where Mr. Boyd was located. Harvey had a pistol and Stiteler was holding Harvey's AR-15 rifle which had recently been converted into an automatic weapon. Harvey and Stiteler told the Boyds they needed money. Mr. Boyd then went into the bedroom and got his wallet. Sometime during the course of the robbery, Harvey and Stiteler exchanged guns so that Harvey now had possession of the automatic weapon. After getting the money from the Boyds, Harvey and Stiteler discussed what they were going to do with the victims and decided they would have to kill them. Sensing their impending danger, the Boyds tried to run, but Harvey fired his gun, striking them both. Mr. Boyd apparently died instantly. Harvey left the Boyds' home but reentered to retrieve the gun shells. Upon hearing

> Mrs. Boyd moaning in pain, he shot her in the head at point blank range. Harvey and Stiteler then left and threw their weapons away along the roadway.
>
> On February 27, 1985, Harvey was stopped for a driving infraction in Okeechobee County and subsequently placed under arrest for the Boyds' murders.[1] He was read his Miranda rights at that time. He was then transported to the Okeechobee County Sheriff's Department and again read the Miranda warning. Harvey was questioned and interrogated, and after speaking with his wife, gave a statement in which he admitted his involvement in the Boyds' murders.

Harvey v. State, 529 So.2d 1083, 1084 (Fla. 1988) (footnote omitted). The penalty phase evidence resulted in the finding of the following aggravating and mitigating factors:

> Finally, Harvey attacks the imposition of the death penalty on the premise that there was insufficient evidence to support three of the four aggravating circumstances which were found by the trial judge.[4] Thus, he disputes the findings that the murders were (1) especially heinous, atrocious and cruel, (2) were committed for the purpose of avoiding lawful arrest, and (3) were committed in a cold, calculated and premeditated manner. In determining whether the circumstances of heinous, atrocious and cruel applies, the mind set or mental anguish of the victims is an important factor. Phillips v. State, 476 So.2d 194 (Fla. 1985). Both victims in this case were elderly persons who had been accosted in their home. They became aware of their

impending deaths when Harvey and Stiteler discussed the necessity of disposing of witnesses. In desperation, the Boyds tried to run away, but Harvey shot both of them. When Harvey later came back into the house and realized that Mrs. Boyd was not yet dead, he fired his gun into her head at point blank range. See Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 62 L. Ed. 2d 176, 100 S. Ct. 239 (1979). We find these facts sufficient to support a finding that both murders were especially heinous, atrocious and cruel.

We also find that the murders were committed for the purpose of avoiding lawful arrest. The test is whether the dominant motive behind the murders is to eliminate witnesses who can testify against the defendant. Floyd v. State, 497 So.2d 1211 (Fla. 1986). Both Harvey and Stiteler were known by their victims, and they discussed in the Boyds' presence the need to kill them to avoid being identified.

Finally, the facts support the finding that the murders were committed in an especially cold, calculated and premeditated manner. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). That Harvey and Stiteler planned the robbery in advance and even cut the phone lines before going over the bridge to the Boyds' home would not, standing alone, demonstrate a prearranged plan to kill. However, once the Boyds were under their control, they openly discussed whether to kill the Boyds. These murders were undertaken only after the reflection and calculation which is contemplated by this statutory aggravating

circumstance. See Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). We hold that the trial judge did not err by concluding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances.[5]

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[4] Harvey concedes the propriety of the finding that the murder was committed while he was engaged in the commission or the attempt to commit robbery or burglary.

[5] The judge found as a mitigating circumstance that Harvey had a low IQ and poor educational and social skills.

Id, at 1087.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW IS NOT WARRANTED AS THE STATE COURT' S DETERMINATION WAS PREMISED ON AN APPLICATION OF STRICKLAND v. WASHINGTON, AND FLORIDA v. NIXON; THE DECISION BELOW DOES CONFLICT WITH ANY OTHER FEDERAL OR STATE CASE OPINION AND THE FLORIDA SUPREME COURT' S FACTUAL FINDINGS ARE SUPPORTED BY THE RECORD (CLAIMS I and II restated)

In his initial claim, Harvey urges this court to extend the per se rule of United States v. Cronic, 466 U.S. 648, (1984) to sixth amendment claims involving a trial counsel's strategic decision to allow a "biased juror" to serve in a capital case. In support thereof, he alleges that a conflict exists among the lower federal courts as to whether there should be a presumption of "actual prejudice" when the alleged deficient performance of counsel involves jury selection. Harvey also claims that Florida v. Nixon, 543 U.S. 175 (2004), requires that counsel must confer with his client prior to conceding guilt, and failure to do so requires a finding of per se prejudice. He concludes with arguing that because the Florida Supreme Court erroneously applied the well established rule of Strickland v. Washington, 466 U.S. 668 (1984), instead of Cronic, certiorari review is required. Harvey is incorrect.

First, there is no conflict among the lower federal courts regarding whether Strickland applies in the context of voir dire. Without a doubt, Strickland applies to strategic decisions regarding jury selection. The issue does not expose a question of unsettled federal law. This claim turns completely on its specific facts, which are of no interest to anyone other than the parties

to this litigation, and which are of insufficient importance to justify granting the writ. See Bartlett v. Stephenson , 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). . There is no proper basis for certiorari review.

In state collateral proceedings below, Harvey raised an issue of ineffective assistance of counsel based on trial counsel's failure to strike alternate juror Brunetti. Harvey alleged that she should have been stricken based on her statements that she did not think she could be impartial at the guilt phase because she was aware, through a newspaper article, that Harvey confessed to the double murders.[1] Harvey was granted an evidentiary hearing on the issue. In upholding the denial of relief the Florida Supreme Court explained as follows:

> Harvey's trial counsel, who had previously worked on many other capital cases, testified that because of the strong evidence of guilt and the fact that Harvey's motion to suppress the confession had been denied, he had concluded that there was no chance of obtaining an acquittal. While he had no independent recollection of juror Brunetti, upon reviewing the transcript he concluded that her responses indicated that she was receptive to psychological testimony. In the course of her testimony, she had observed that while the death penalty was a deterrent to the person sentenced, she did not "necessarily believe that two wrongs made a right." Harvey's counsel

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[1] The information uncovered by Brunetti was strictly factual and was information that was properly admitted at trial. (Pet. App. C, 43a).

> expressed the opinion that it was reasonable strategy to accept juror Brunetti and concentrate on the penalty phase.
>
> We hold that there was competent and substantial evidence to support the lower court's finding that defense counsel made a reasonable decision not to challenge Brunetti based on his strategy of attempting to find jurors likely to recommend a life sentence instead of the death penalty.

(Pet. App. C, 43a-44a). Respondent asserts that the state courts' determination was a correct determination under the applicable law, i.e., Strickland. Indeed the reasonableness of the ruling was underscored by this Court's more recent decision in Nixon.

In rebuttal Petitioner attempts to create "conflict" among federal courts by alleging that the Sixth Circuit decision in Hughes v. United States, 258 F. 3d 453, 463 (6th Cir. 2001), stands for the proposition that Cronic applies in sixth amendments claims involving juror bias. He further alleges that the Fifth, Eighth, and Tenth Circuits are in express conflict with Hughes.[2] Harvey misreads Hughes.

First, Hughes, a non-capital case, rendered four years before Nixon, does not stand for the proposition that Cronic should apply in claims of juror bias. In fact, to the contrary, the court therein applied Strickland in granting relief. Hughes , 258

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[2] Harvey specifically references Virgil v. Dretke, 446 F.3d 598, 612 (5th Cir. 2006)(ineffective assistance of counsel claims regarding performance at voir dire requires an analysis under the two prongs of Strickland); Hale v. Gibson, 227 F.3d 1298, 1319 (10th Cir. 2000)(same); Johnson v. Armontrout, 961 F.2d 748, 755-56 (8th Cir. 1992)(same).

F.3d at 463.[3] The court explained:

> Under Strickland v. Washington, 466 U.S. 668, 687 (1984), finding ineffective assistance of counsel requires first finding that counsel's performance was objectively unreasonable under the Sixth Amendment, and second, that counsel's deficient performance prejudiced defendant. "Judicial scrutiny of counsel's performance must be highly deferental." Id. at 689.
>
> Counsel is also accorded particular deference when conducting voir dire. An attorney's actions during voir dire are considered to be matters of trial strategy. Nguyen v. Renolds, 131 F. 3d 1340, 1349 (10th Cir. 1997) (citing Teague v. Scott, 60 F. 3d 1167, 1172 (5th Cir. 1995)). A strategic decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.

Id., 457. The Court then framed the issue as follows:

> Petitioner's "claim of ineffective assistance of counsel is grounded in the claim that counsel failed to strike a biased juror. To maintain a claim that a biased juror prejudiced him, however, [Petitioner] must show that the juror was actually biased against him." Goeders v. Hundley, 59 F.3d 73, 75 (8th Cir. 1995) (citing Smith v. Phillips, 455 U.S. 209, 215, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1981)).

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[3] In fact, the opinion does not even cite to Cronic.

Id. (emphasis added). In granting relief therein, the court determined that because the juror was biased[4] and because counsel did not address the bias in any manner, the failure to do so was objectively unreasonable under Strickland. Id., at 460. Clearly, Hughes is not in conflict with any of the other circuits on this issue. To the contrary, it is clear that Strickland is applicable when assessing trial strategy involving voir dire. There is no conflict among the circuits, and review must be denied.

When applying the law to the facts of this case, it is clear that the Florida Supreme Court's decision was correct. In explicitly rejecting the proposition that Cronic should apply to strategic decisions involving concessions of guilt in a capital case, this Court recognized the significance of the penalty phase and the particular considerations that arise which are unique to capital cases. This Court explained:

> Cronic recognized a narrow exception to Strickland's holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense... We illustrated just how infrequently the "surrounding circumstances [will] justify a presumption of ineffectiveness" in Cronic itself...

Nixon, 543 U.S. at 190-191 (2004).

Similar to the concerns facing counsel in Nixon, counsel

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[4] The juror stated she could not be fair due to her personal relationships with police officers and detectives in a case where the victim was a federal marshal, who had been robbed at gunpoint.

herein was also focusing his efforts on saving Harvey's life due to the overwhelming evidence of his guilt. Harvey confessed on tape that he shot the elderly defenseless couple because they recognized him during the robbery. The decision to kill them was discussed in front of them. When they attempted to escape, Harvey shot them both. He also admitted that they returned to the scene to collect incriminating evidence. When he heard the female victim moaning, he shot her again. Harvey v. State , 529 So. 2d 1083, 1084 (Fla. 1988). Because of this very damaging evidence, counsel left with very limited strategic choices, reasonably focused most of his efforts on the penalty phase and simply conceded guilt. Herein, counsel sought to retain jurors, including Ms. Brunetti, who would be amenable to the type of mental health mitigating evidence that was to be presented at the penalty phase. That strategy was reasonable under Nixon. Simply because the strategy also encompassed jury selection, does not somehow take the analysis away from Strickland. See Nguyen v. Reynolds, 131 F.3d 1340(10th Cir. 1997)(recognizing that counsel's actions during voir dire are a matter of trial strategy). Harvey's attempt to expand Cronic must be denied

Harvey also asks this Court to apply the *per se* rule of Cronic and recede from Strickland in those instances where counsel fails to first consult with the defendant regarding a strategy involving a concession of guilt. Harvey's claim is not supported by the law or the record in this case.[5]

In Nixon this Court explicitly rejected the suggestion that Cronic should apply when counsel fails to discuss such a strategy

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[5] The record does not support Harvey's claim that no such consultation took place. Counsel testified that he does not remember the specifics in this case, however, he would be shocked to learn that he did not discuss the strategy with Harvey. Harvey did not offer any contrary evidence.

with a defendant. Since Strickland, the law is clear that counsel always has a duty to discuss potential strategies with the defendant. Nixon, 543 U.S. at 178. A failure to do so is a factor to be considered when assessing the reasonableness of counsels' actions. Id. Harvey's request for an explicit rule requiring trial counsel to confer with their client prior to conceding guilt or else prejudice would be presumed, would completely undermine this Court's ruling in Nixon, Strickland and Roe v. Flores-Ortega 528 U.S. 470 (2000)(refusing to impose any bright line requirements on counsel, finding that to be inconsistent with Strickland). Harvey does not offer any sound reason to alter the well established rule of Strickland or its progeny, Nixon.

The Florida Supreme Court, in properly reviewing this issue under the two-prong standard as explained in Strickland, found Harvey to have suffered no prejudice considering the great weight of the evidence against him.

> By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder... However, because Harvey has failed to demonstrate prejudice based on counsel's concession of guilt, we need not address the deficiency prong of Strickland, and we deny 3.850 relief on this issue. See Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. 2052 (holding there is no need for a court deciding an ineffective assistance of counsel claim to address both prongs of the inquiry if there as (sic) been an insufficient showing on one prong). In order to establish prejudice, a defendant must demonstrate that there is a reasonably (sic) probability that the result of the proceeding would have been

> different, but for counsel's unprofessional error. Trial counsel said nothing more to the jury than what Harvey said during his confession to police. The evidence against Harvey was overwhelming even without counsel's admission that Harvey committed first-degree murder. We cannot say, given all of the evidence introduced at trial, there is a reasonable probability that, but for any errors by counsel, the result of the proceeding would have been different, i.e., that our confidence in the outcome has been undermined.

Harvey v. State, 946 So.2d 937, 943-944 (Fla. 2006). The Florida court's decision is squarely in line under both Strickland and Nixon. Harvey has not shown otherwise.

Because the petition presents nothing more than the application of long-standing precedent, and has little significance except for the" parties to this litigation," review must be denied. Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987); Butz v. Glover Livestock Commission C., 411 U.S. 182 (1973) (dissenting opinion); Powell v. Nevada 511 U.S. 79, 86-7 (1994) (Thomas, J., dissenting); Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140 (1985) (Stevens, J., on denial of certiorari); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955); see also, Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) ("... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties ....").

CERTIORARI REVIEW IS NOT WARRANTED AS THE STATE COURT' S DETERMINATION REASONABLY APPLIED THE STANDARDS SET FORTH IN STRICKLAND IN DETERMINING THAT TRIAL COUNSEL'S DECISION TO FOREGO ONE AVENUE OF MITIGATING EVIDENCE IN ORDER TO PURSUE ANOTHER WAS REASONABLE. (CLAIM III restated)

In his final claim, Harvey asserts that the Florida Supreme Court failed to adhere to this Court's directives under Strickland v. Washington, 466 U.S. 684 (1984) (and emphasized more recently in Wiggins v. Smith, 539 U.S. 510 (2003), and Rompilla v. Beard, 545 U.S. 374 (2005)) in declining to find trial counsel ineffective for what Harvey contends was a complete disregard of certain mitigation evidence. Had trial counsel not abandoned the investigation into petitioner's mental health, he would have unearthed material that may have swayed the jury, or, at the very least, impacted the findings of four of five statutory aggravators accepted by the trial court.[6] This position is meritless. The Florida court's opinion clearly complied with the analysis required by Strickland and its progeny. Moreover, the findings of the state courts are supported by the record. See Bartlett v. Stephenson , 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). There is no basis for review.

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[6] (1) the murder was committed while engaged in a robbery or burglary; (2) it was heinous, atrocious, and cruel; (3) it was committed for the purpose of avoiding lawful arrest, and (4) it was committed in a cold, calculated, and premeditated manner. (Pet. App. B, 26a).

On appeal, the Florida court found trial counsel's investigation to be adequate and reasonable. In Harvey v. State, 946 So.2d 937 (Fla. 2004), the court engaged in a Strickland analysis, finding trial counsel to have acted on a sound and reasonable trial strategy.

> While in hindsight counsel could have pursued a different penalty phase strategy, the strategy counsel employed was not unreasonable and did not fall outside the broad range of competent performance "under prevailing professional norms." Strickland, 466 U.S. at 688, 104 S.Ct. 2052. In considering a claim of ineffective assistance of counsel, we must fairly assess trial counsel's performance at the time of trial based on the information he had. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.
>
> ...
>
> Harvey has not demonstrated that trial counsel was deficient in his investigation of possible mental health mitigation. This Court has found counsel's performance to be deficient where counsel "never attempted to meaningfully investigate mitigation" although substantial mitigation could have been presented. Rose v. State, 675 So.2d at 572; *947 see also Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.1995) (finding that a woefully inadequate investigation failed to reveal a large amount of mitigating evidence such as prior psychiatric hospitalizations and statutory

> mental health mitigators); State v. Lara, 581 So.2d 1288, 1289 (Fla.1991) (finding counsel virtually ignored preparation for penalty phase). This is not the case here. Consistent with the trial court's factual findings, trial counsel conducted a reasonable investigation into Harvey's mental health background and incorporated his findings into a penalty phase strategy.
>
> Trial counsel explained his strategy at the evidentiary hearing. He chose to present Harvey as a "good person." Trial counsel wanted the jury to see that these murders were inconsistent with Harvey's character and were committed without premeditation in the midst of a robbery gone wrong. Trial counsel testified that he thought about this strategy and decided to implement it after the motion to suppress Harvey's statement was denied. Trial counsel testified that he thought it was important to carry a consistent theme throughout both phases of the trial and believed this was Harvey's best chance for a life sentence. In cases where counsel did conduct a reasonable investigation of mental health mitigation and then made a strategic decision not to present this information, this Court has affirmed the trial court's finding that counsel's performance was not deficient. See Asay v. State, 769 So.2d 974, 985 (Fla.2000). We agree with the trial court and find that trial counsel's strategy was not unreasonable under the circumstances and did not fall outside the range of professional competent assistance.

Id., at 946-947. Despite Harvey's claims to the contrary, the Florida Supreme Court recognized that trial counsel actually did conduct an adequate mental health investigation. The Court

found as follows:

> Harvey alleges that trial counsel failed to fully investigate his background for mental health mitigation. The trial court found, however, that trial counsel retained psychologist Dr. Fred Petrilla, met and ate dinner with Harvey's parents and siblings on two occasions, and obtained Harvey's school records. The trial court also found that Dr. Petrilla interviewed Harvey's family and coworkers and that Dr. Petrilla was given background material concerning Harvey. These findings are supported by the record.
>
> At the evidentiary hearing, trial counsel testified that he was concerned with Harvey's mental health and hired Dr. Petrilla for the purpose of conducting a mental health evaluation. Counsel indicated that he provided Dr. Petrilla with case materials and medical records. Counsel testified that neither Harvey nor Harvey's family gave him any indication of possible mental health mitigators, although they did inform counsel that Harvey had been in a serious car accident when he was sixteen years old. Trial counsel said it was determined that Harvey had never been institutionalized.
>
> ...
>
> Harvey argues that trial counsel was deficient because he did not retain a psychiatrist as Dr. Petrilla had recommended...Although Dr. Petrilla suggested it, trial counsel testified at the evidentiary hearing that he did not employ a psychiatrist because he felt the jury might see calling more than one mental health expert as

> trying too hard to make an excuse for bad behavior, especially given the fact that Harvey had never been treated for mental illness.

Supra, at 945-946.(emphasis addded).

Harvey has not established a sufficient basis for review. This case held true to the directives in Strickland The Florida court's decision is supported by the record; does not present a conflict' nor involve an unsettled question of law. Although Harvey directs this Court's attention to two decisions out of the lower courts, these cases are largely irrelevant.[7] In these cases, trial counsel failed to conduct any sort of meaningful investigation for mitigation. Petitioner's counsel, by contrast, did conduct a meaningful and adequate investigation. The decision to forego further mental health evaluation and concentrate solely on developing Harvey as a "good person" was sound strategy, just as the Florida court held. Review must be denied.

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[7] Daniels v. Woodford, 428 F.3d 1181, 1203-04 (9th Cir. 2005); Commonwealth v. Gorby, 909 A.2d 775, 791 (Pa. 2006).

Conclusion

WHEREFORE based on the relevant case law and factual findings, this Court must DENY certiorari review.

Respectfully submitted,

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